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No. 95

In the Supreme Court of the United States

OCTOBER TERM, 1946

AIRCRAFT & DIESEL EQUIPMENT CORPORATION,
APPELLANT

v.

MAURICE HIRSCH ET AL.

ON APPEAL TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

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BRIEF FOR THE APPELLEES

OPINION BELOW

The opinion of the District Court of the United States for the District of Columbia (R. 430–436) is reported at 62 F. Supp. 520.

JURISDICTION

The judgment of the district court was entered on March 5, 1946 (R. 439). The petition for appeal was presented on March 29, 1946 (R. 449), and allowed on April 3, 1946 (R. 460–461). The jurisdiction of this Court to review the judgment complained of is conferred by Section 3 of the Act

of August 24, 1937. On May 27, 1946, this Court noted probable jurisdiction (R. 469).

QUESTION PRESENTED

Whether, in a suit by appellant seeking (1) a declaratory judgment that the Renegotiation Act is unconstitutional and (2) an injunction restraining appellees from proceeding to collect excessive profits determined to have been realized by appellant, the court below erred in dismissing the complaint on the grounds that the suit was premature and that equity had no jurisdiction.

STATUTE INVOLVED

The statute pursuant to which a determination was made of excessive profits realized by appellant during its fiscal year ending November 30, 1943, is Title VII of the Revenue Act of 1943, c. 63, 58 Stat. 21, 78, 50 U. S. C. App., Supp. V, 1191, which became effective February 25, 1944. This statute amended the Renegotiation Act which first became law on April 28, 1942.[1] The text of

[1] The original Renegotiation Act was contained in Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, approved April 28, 1942, c. 247, 56 Stat. 226, 245, and was amended by the Revenue Act of 1942, approved October 21, 1942, c. 619, 56 Stat. 798, 982, the Military Appropriation Act, 1944, approved July 1, 1943, c. 185, 57 Stat. 347, the Act of July 14, 1943, c. 239, 57 Stat. 564, the Revenue Act of 1943, approved February 25, 1944, c. 63, 58 Stat. 21, 78, and the Act of June 30, 1945, c. 210, 59 Stat. 294 (50 U. S. C. App., Supp. V, 1191).

the final form of the Renegotiation Act, together with the text of the original statute and intervening amendments, is set forth in a separate pamphlet (Appendix) filed with this brief and entitled "The Renegotiation Act." Section 701 (b) of the Revenue Act of 1943 amended Section 403 of the Act of April 28, 1942, so that it provided, insofar as here pertinent, as follows:

Section 403 (a) (Appendix, pp. 18–25) defines the terms employed in the Act, including an elaborate and detailed definition of "excessive profits."

Section 403 (b) (Appendix, pp. 25–27) directs the Secretaries of the Departments to insert in Department contracts provision for the elimination of excessive profits through renegotiation, provision for retention by the United States of excessive profits or repayment of such profits to the United States, and a provision requiring prime contractors to insert similar clauses in subcontracts.

Section 403 (c) (1) (Appendix, pp. 27–29) directs the War Contracts Price Adjustment Board to give notice of renegotiation proceedings; authorizes attempts to agree with the contractor as to the amount to be refunded to the United States; directs the issuance of an order for the elimination of excessive profits if no agreement is reached; provides for renegotiation on the basis of total renegotiable contracts rather than on the basis of separate contracts; and provides that

upon demand a statement shall be furnished to the contractor of the basis of and the reasons for the Board's determination.

Section 403 (c) (2) (Appendix, pp. 29–30) directs the elimination of excessive profits either by reductions in the amounts payable to the contractor under contracts with the Departments, or by withholding payments otherwise due the contractor, or by directions to prime contractors to withhold for the United States sums otherwise due a subcontractor, or by court action brought on behalf of the United States; provides that the United States shall indemnify each contractor against all claims by subcontractors on account of withholdings; and provides for appropriate fiscal operations in the Treasury Department.

Section 403 (e) (Appendix, pp. 37–39) provides for a redetermination of a renegotiation order by the Tax Court; that each contractor or subcontractor shall be entitled to *de novo* redetermination in that court of the amount of his excessive profits; that the determination of the Tax Court as to the amount of such excessive profits shall be final and conclusive; and that the filing of a petition with the Tax Court shall not stay execution of the order of the Board.

STATEMENT

This is an appeal from a judgment of a specially constituted three-judge court, convened pursuant to Section 3 of the Act of August

24, 1937, c. 754, 50 Stat. 751, 752, 28 U. S. C. 380a; dismissing a suit by appellant, Aircraft & Diesel Equipment Corporation, seeking to obtain a declaratory judgment that the Renegotiation Act is unconstitutional and to restrain appellees, members of the War Contracts Price Adjustment Board, the Secretary of War, and the Under Secretary of War,[2] from proceeding to collect under the provisions of the Renegotiation Act profits determined to be excessive (R. 164–168).

Appellant is a corporation organized under the laws of the State of Delaware and having its principal office and place of business at Chicago, Illinois (R. 133). Its business is the manufacture of diesel fuel injection equipment and precision parts and also aircraft precision parts (R. 134). It employs the accrual method of bookkeeping and keeps its accounts and makes its federal income tax returns each year on the basis of a fiscal year ending November 30th (R. 135).

Pursuant to the Renegotiation Act, representatives of the Secretary of War commenced renegotiation proceedings with appellant for the fiscal year ended November 30, 1943, with respect to the aggregate of the amounts received or accrued by appellant under contracts with

[2] On April 2, 1946, the district court entered an order substituting the present appellees as the respective successors in office to defendants named in the original action (R. 459).

the Departments and subcontracts as defined in the Renegotiation Act.[3] It was determined that appellant's dollar volume of sales for the fiscal year 1943 amounted to $3,549,000, that $3,520,000 of this amount was renegotiable, and that appellant's profits on renegotiable sales during 1943 amounted to $1,526,000 before taxes, or 43.3 percent of sales (R. 121).[4]

[3] With the exception of one small Navy contract, all of the contracts involved were subcontracts.

[4] Appellant also alleges that the sum of $204,000, determined by the Under Secretary of War to be excessive profits for the fiscal year ending November 30, 1942, after making due allowances for taxes, was illegally exacted from it, particularly on the ground that the Sixth Supplemental National Defense Appropriation Act of 1942 (56 Stat. 226, 245), to the extent that it authorized such renegotiation, was unconstitutional. The sum in question has been paid into the Treasury of the United States by customers of the appellant. (R. 135–137.) Appellant has filed with, and there is now pending in, the Tax Court, a petition to review this renegotiation order (R. 136; appellant's brief, p. 10). The prayer of the amended complaint (R. 164–168) asks for no specific relief in respect of this sum of money nor does it request that that part of the 1942 Act providing for renegotiation be declared unconstitutional. All relief prayed for relates to the constitutionality of the Renegotiation Act of 1943, to the excessive profits which appellant had been held to have realized for the fiscal year ending November 30, 1943, and to the threats that appellant's customers would be directed to withhold for the account of the United States the sum of $270,000. See appellant's brief, pp. 5–6. The theory of the appellant (brief, p. 22) appears to be that if the first Act be unconstitutional or if the action taken by the renegotiation authorities exceeded the powers conferred by the Act, the $204,000 has been illegally collected; and that if the second Act should be held to be constitutional and the $270,000 properly deter-

In the course of the renegotiation proceedings, conferences were held in Washington between representatives of the Secretary of War and appellant. In connection with the conferences, there were submitted by the appellant and obtained from governmental or other reliable sources, certain financial, operating and other data relating to appellant's business and profits derived during 1943. Appellant was afforded full opportunity to submit such information and to present such contentions as it deemed material to a determination of excessive profits within the meaning of the Act. In determining the amount of excessive profits, due consideration was given to all such financial, operating and other data and information so furnished or obtained, to each of the contentions presented, and to all of the factors referred to in Subsection 403 (a) (4) (A) of the Act. (R. 168–169.)

As a result of the renegotiation proceedings, it was determined that of the appellant's profits before federal taxes on renegotiable sales in the

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mined to be excessive profits, then the $204,000 should be credited against it as a set-off. Appellant specifically disclaims any request for repayment of the $204,000 should both Acts be determined to be unconstitutional, although it does state that it would be entitled to repayment of that amount (appellant's brief, p. 22).

In view of appellant's theory, the propriety of the $204,000 withholding assumes importance in the instant case only in the event that the court below is held to have had jurisdiction to reach the constitutional questions. It does not affect the arguments presented in this brief supporting the district court's decision that it lacked such jurisdiction.

fiscal year 1943, $1,265,000 represented excessive profits within the meaning of the Renegotiation Act (R. 169). An order to that effect was entered on January 11, 1945, by Robert P. Patterson, Under Secretary of War, acting on behalf of the War Contracts Price Adjustment Board (R. 168–170). On January 11, 1945, appellee Patterson advised appellant of the determination of excessive profits and enclosed a copy of the order. The letter further advised appellant that as provided in the Act, such order might, in the discretion of the Board, be reviewed by the Board upon appellant's request, or upon the Board's own motion, but unless the review were initiated within the time prescribed by the Act the order would be deemed the determination of the Board. (R. 173.)

On February 28, 1945, appellant filed with the Board a request that it initiate a review of the order of January 11, 1945 (R. 140). By letter dated May 3, 1945, the Board advised appellant that no review of such order had been initiated and that accordingly such order was to be deemed the determination of the Board (R. 174–175). The Board's letter also stated that it had been advised by the Bureau of Internal Revenue that the tax credit, as provided in Section 3806 of the Internal Revenue Code, applicable to appellant's excessive profits of $1,265,000, amounted to $994,-

235.28, and that assuming the correctness of the basis upon which the computation of the tax credit was made, the balance due the Treasury of the United States was $270,764.72. Appellant was further advised that interest at the rate of 6 percent per annum would accrue from and after May 18, 1945 on any amount due and unpaid.

Section 403 (c) (2) of the Renegotiation Act (Appendix, pp. 29–30) provides various methods for the elimination of excessive profits. The method proposed to be followed for the elimination of excessive profits determined to have been realized by appellant was described by Colonel Maurice Hirsch, Chairman of the War Contracts Price Adjustment Board and the War Department Price Adjustment Board, in his affidavit dated June 9, 1945, as follows (R. 117–118):

> An investigation has been made by the War Department with respect to the possible methods for the elimination of the excessive profits found to have been realized by Aircraft & Diesel Equipment Corporation during its fiscal year ending November 30, 1943. The investigation has failed to disclose that there are any sums now owing from the United States to the Corporation and, accordingly, the excessive profits cannot be eliminated by withholding sums otherwise payable from the United States to the Corporation. The investigation has disclosed, however, that there are

> contractors doing business with the United States who owe various sums of money to the Corporation. It has been decided that the interests of the Government will be served by issuing withholding orders to two or possibly three of such contractors and it has accordingly been determined that the collection method to be adopted in this case will be the issuance of withholding orders to two or possibly three of such contractors. If this method of collection does not result in a discharge of the claim a recommendation will be made to the Attorney General that suit be brought by the United States against the Corporation to compel payment of the claim.

On April 4, 1945, the appellant filed with the Tax Court of the United States, pursuant to the provisions of Section 403 (e) (1) of the Act (Appendix, pp. 37–38), a petition requesting a determination *de novo* of the amount, if any, of its excessive profits realized during its fiscal year ended November 30, 1943 (R. 142). The United States filed a motion to strike this petition on the ground that it was filed during the time when the War Contracts Price Adjustment Board might initiate a review (R. 142). The motion was heard before the Tax Court on May 16, 1945 (R. 142) and was subsequently granted. Thereafter, on July 2, 1945, appellant filed another petition with the Tax Court for a determination of its excessive profits, if any, for the fiscal year 1943 (R. 175–

192, 443). This proceeding is still pending.[5] This petition raised not only issues as to the constitutionality of the statute, but other questions, including contentions that appellant had realized no excessive profits, that certain sales were exempt from the Act, and that the compensation paid appellant's officers was reasonable and a proper element to be included in costs (R. 191, 181–184).

On May 19, 1945, appellant instituted this suit in the District Court of the United States for the District of Columbia (R. 1–3). In its amended and supplemental complaint, filed July 2, 1945, appellant sought a declaratory judgment that the Renegotiation Act is unconstitutional, or, if the several sections of the Act be deemed separable and not all unconstitutional, that Sections 403 (c) (2) and (e) (1) be declared unconstitutional (R. 133). Appellant also sought injunctive relief restraining appellees from further proceeding under the Renegotiation Act and particularly under Sections 403 (c) (2) and (e) (1) (R. 133). In addition, appellant sought injunctive relief restraining appellees from taking any further action in respect of the renegotiation order pend-

[5] We are advised by the Clerk of the Tax Court of the United States that the three cases involving excessive war profits of appellant for the respective fiscal years ending November 30th in 1942, 1943, and 1944, which cases have the Tax Court docket numbers 9–R, 228–R and 559–R, will be set for hearing on a calendar of cases scheduled to be held by a Division of the Tax Court in Chicago, Illinois, beginning February 24, 1947.

ing a redetermination by the Tax Court (R. 133).

At appellant's request, a statutory three-judge district court was convened. Appellees moved to dismiss the complaint and for summary judgment (R. 3–4). On September 28, 1945, the court entered its opinion (R. 430–436), and on March 5, 1946, entered an order denying appellant's motion for an interlocutory injunction and granting appellees' motions to dismiss the amended and supplemental complaint and for summary judgment (R. 439). The order provided, however, that it was entered without prejudice to the right of the appellant to maintain actions at law against its debtors and to bring suit as it may be advised in the Court of Claims (R. 439).

The court held that appellant's suit was premature as it had failed to exhaust its administrative remedy before the Tax Court (R. 433–436). In addition to this, the court held that "equity has no jurisdiction for the reason that the plaintiff has complete remedies by actions at law" (R. 434).

On April 3, 1946, the district court entered an order allowing an appeal to this Court and granting appellant's motion to enjoin appellees pending appeal upon the posting of a bond in the sum of $100,000 (R. 460–461).

SUMMARY OF ARGUMENT

I

Inasmuch as appellant's petition before the Tax Court is still pending, this case is premature re-

cause appellant has failed to exhaust its administrative remedies. *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540, is controlling. The statutory remedy is not inadequate because of any failure by Congress to assure payment of refunds ordered by the Tax Court; Congress has provided for such refunds with interest. Appellant's claim that its remedy is inadequate because the Tax Court's determination is not subject to judicial review is premature, as it was in the *Waterman* case. The *Waterman* decision also disposes of the argument that the possible necessity of multiplicity of suits permits disregard of the exhaustion doctrine. The fact that the administrative process has gone further in this case than in *Waterman* does not distinguish the cases, as long as the remedy before the Tax Court has not been exhausted.

Appellant's contention that the exclusive administrative remedy provided by the statute need not be exhausted because the sums claimed to be due may be collected, by withholding, prior to the conclusion of the administrative proceeding is refuted by *United States* v. *Ruzicka*, No. 54, this Term, decided December 16, 1946. In any event, a system of collection by the Government in advance of litigation but subject to refund when the collection is unlawful provides an adequate remedy, as the analogy of tax law attests.

The exhaustion doctrine applies even though a

constitutional question is raised. The Tax Court can resolve appellant's constitutional issues along with the other questions, and may make disposition of the constitutional questions completely unnecessary. Cf. *Alma Motor Co.* v. *Timken Co.*, No. 11, this Term, decided December 9, 1946. In any event there is no merit to the contention that the Act is unconstitutional *in toto*.

II

If sums are withheld by appellant's customers at the order of the Government, appellant has an adequate remedy at law by way of action against them which the United States would in fact defend. The record in this case indicates that there would not be any multiplicity of such suits. The adequacy of this remedy at law in itself defeats the jurisdiction of equity to grant injunctive relief. *Coffman* v. *Breeze Corporations*, 323 U. S. 316.

III

Inasmuch as the sums to be withheld by contractors are to be turned over to the United States and the contractor indemnified by the United States, this case is in substance one against the United States to which Congress has not consented. The case is not substantially different from *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371, which involved another stage of the renegotiation process.

ARGUMENT

INTRODUCTION

The district court, properly we submit, held that it was without jurisdiction to grant the injunctive relief for which appellant prayed, both because appellant had an adequate remedy at law and because the suit was premature, appellant having failed to exhaust its administrative remedies.[6] The decision is in accord with the decisions of two other three-judge district courts in the District of Columbia on the same question. *Wade* v. *Stimson*, 65 F. Supp. 277 (D. D. C.), pending on appeal No. 724; *Knowles* v. *Hirsch*, 65 F. Supp. 690 (D. D. C.). The court below relied heavily upon the decision of this Court in *Coffman* v. *Breeze Corporations*, 323 U. S. 316, in concluding that there was no equity jurisdiction because appellant had an adequate remedy at law. It also held that the suit was premature because appellant had not exhausted its administrative remedies, a holding which accords with the subsequent pronouncement of this Court in *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540. While either of these grounds alone is adequate to dispose of appellant's contention,

[6] While the opinion below did not discuss the question of a declaratory judgment, it is clear that such relief was denied because "The same principles which justified dismissal of the cause insofar as it sought injunction justified denial of the prayer for a declaratory judgment." *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540, 545.

another reason—namely, that the action constitutes a suit against the United States—finds support in the decision of this Court in *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371, decided after the opinion below.[7] We submit that the rationale of any one of these three decisions required the court below to dismiss appellant's complaint.

The court below reached only the jurisdictional questions and did not consider the merits of the case. Although we have no desire to prevent a decision by this Court as to the constitutionality of the Renegotiation Act, which has already been sustained in *Spaulding* v. *Douglas Aircraft Co.*, 154 F. 2d 419 (C. C. A. 9) and *United States* v. *Alexander Wool Combing Co.*, 66 F. Supp. 389 (D. Mass.), we submit that the decision of the court below was so clearly correct and the jurisdictional questions in this case so pervasively controlling, that it is neither necessary nor appropriate to discuss the merits of the case or the constitutional arguments which appellant so vigorously urges.

I

THE APPELLANT MUST EXHAUST ITS TAX COURT REMEDY BEFORE RESORTING TO THE COURTS

Appellant, on July 2, 1945, filed with the Tax

[7] In *Wade* v. *Stimson*, *supra*, the court, while resting primarily upon *Macauley* v. *Waterman Steamship Corp.*, *supra*, also placed reliance upon *Mine Safety Appliances Co.* v. *Forrestal*, *supra*.

Court of the United States, pursuant to Section 403 (e) (1) of the Renegotiation Act, its petition for a determination of excessive profits, if any, which it had realized during the fiscal year ended November 30, 1943. That subsection provides that "upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency." It is also there provided that the proceeding before the Tax Court "shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding *de novo.*" The proceeding in the Tax Court is still pending. In the Tax Court appellant is raising not only the constitutional questions sought to be presented here, but other issues (R. 181–184). If it prevails in that court, the Under Secretary's finding of excessive profits would, of course, be set aside.

A consequence of this statutory scheme is that until the Tax Court acts appellant has not exhausted its administrative remedies. The doctrine of exhaustion, as applied to the Tax Court, rests both upon the "long settled rule of judicial administration" (*Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51), and upon the specific provisions of the Renegotiation Act itself, which expressly vests "exclusive jurisdiction" in the Tax

Court and hence divests the district court of jurisdiction concerning renegotiation matters, at least in the first instance.[8]

In *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540, at the last Term, this Court held the exhaustion doctrine applicable to the procedure established under the Renegotiation Act for both of the above reasons.[9] The *Waterman* case would appear to be decisive here. Appellant does not, as we read its brief, even attempt to distinguish the *Waterman* decision.

None of the arguments which appellant advances justifies a different result than that reached in the *Waterman* case.

1. *Provision for refunds.*—Appellant argues, as did *Waterman*,[10] that the Tax Court remedy is inadequate because even if it should prevail in the Tax Court, or eventually in other courts, there is no statutory provision or appropriation by which repayment to it of any amount withheld or previously collected can be assured. This

[8] The jurisdiction of the Tax Court is at least an "exclusive initial power" (*Newport News Shipbuilding Co.* v. *Schauffler*, 303 U. S. 54, 57), whatever may be the ultimate power of judicial review in the courts.

[9] It is to be noted that here, as in the *Waterman* case, appellant seeks to separate the claim presented to the Tax Court into two parts, or part to be heard preliminarily by the district court and by this Court, and the other eventually by the Tax Court if this Court's decision does not dispose of the whole case by holding the statute unconstitutional.

[10] See brief in opposition, pp. 39–42, October Term 1945, No. 435.

is clearly wrong. In the first place the right of refund is clearly implicit in the Act itself. As Congressman Disney, a sponsor of the Act and committee member, expressly stated in the congressional debates, "When the contractor appeals to the Tax Court, there is no stay of the recapture of the money but, of course, a decision by the Tax Court in his favor would entitle him to a refund of amounts that had been recaptured." (89 Cong. Rec. 9929). Pursuant to the obligation established by the Renegotiation Act,[11] Congress has made appropriations for refunds of "any amount finally adjudged or determined to have been erroneously collected by the United States pursuant to unilateral determination of excessive profits, with such interest thereon (at a rate not to exceed 4 per centum per annum) as may be adjudged or determined to be owing in law or equity * * *" (First Deficiency Appropriation Act, 1945, Act of April 25, 1945, 59 Stat. 77, 90; Third Deficieney Appropriation Act, 1946, Pub. Law No. 521, 79th Cong., 2d Sess., approved July 23, 1946.)[12] These statutes cover the fiscal years

[11] See Hearings before Subcommittee of the Commictee on Appropriations, United States Senate, 79th Cong., 1st Sess., on the First Deficiency Appropriation Bill, 1945, on H. R. 2374, p. 256.

[12] Concerning refunds under the Renegotiation Act, the Third Deficiency Appropriation Act, 1946, provides:

"Refunds under Renegotiation Act: To enable the Secretary of the Treasury to make the refunds during the fiscal year 1947, including refunds for prior years, required by section 403 (a) (4) (D) (relating to the recomputation of

1946 and 1947, and it can not be assumed that Congress will not make similar provision for the future in order to carry out the promise implicit in the Renegotiation Act.

2. *Interest.*—The statutes just quoted, it is to be noted, contain provision for 4 percent interest. They therefore also dispose of appellant's suggestion that its statutory remedy is inadequate because any refund would not bear interest. The Congress, however, may lawfully authorize collection in advance without provision for interest on subsequent refunds (see *Nichols* v. *Gaston,* 281 Fed. 67, 70 (C. C. A. 1)). The provisions of the Agricultural Marketing Agreement

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the amortization deduction) and by the last sentence of section 403 (i) (3) (relating to excess inventories) of the Renegotiation Act; and to refund any amount finally adjudged or determined to have been erroneously collected by the United States pursuant to a unilateral determination of excessive profits, with such interest thereon (at a rate not to exceed 4 per centum per annum) as may be adjudged or determined to be owing in law or equity; $15,000,000, together with the unused portion of the $15,000,000, authorized for this purpose in the First Deficiency Appropriation Act, 1945: *Provided*, That to the extent refunds are made from this appropriation of excessive profits collected under the Renegotiation Act and retained by the Reconstruction Finance Corporation or any of its subsidiaries, the Reconstruction Finance Corporation or the appropriate subsidiary shall reimburse this appropriation: *Provided, further*, That the War Contracts Price Adjustment Board or its duly authorized representative shall certify the amount of any refund to be made in pursuance hereof to the Secretary of the Treasury who shall make payment upon such certificate in lieu of any voucher which might otherwise be required."

Act of 1937 (§ 8c (15) (A)–8c (15) (B)) enforced in *United States* v. *Ruzicka*, decided December 16, 1946, contain no provision for interest, and interest has never been allowed on refunds.[13]

3. *Absence of judicial review.*—Appellant argues that its statutory remedy is inadequate because the Act specifically provides that the Tax Court's determination is not subject to court review. The same contention was held in the *Waterman* case not to "affect the application of the rule requiring exhaustion of administrative remedies" (327 U. S., at 545). If, after completion of the administrative process, appellant has a right to judicial review and a need to exercise it, the courts will then be in a position to provide it. Cf. *U. S. Electrical Motors, Inc.* v. *Jones*, 153 F. 2d 134 (App. D. C.).

[13] Interest was not allowed in suits against the United States arising under the internal revenue laws until Section 177 of the Judicial Code was amended by the Revenue Act of 1921 (§ 1324 (b); 42 Stat. 227, 316). Prior thereto, interest was allowed to time of final judgment in suits against collectors, but after probable cause was certified (R. S. § 989) the claim was converted into one against the United States and no interest was thereafter allowable after final judgment, even though payment was delayed for many years (*United States* v. *Sherman*, 98 U. S. 565). This limitation on the right to interest in suit for tax refunds "has never been regarded as rendering the remedy at law inadequate" under R. S. 3224 (*Nichols* v. *Gaston*, 281 Fed. 67, 70 (C. C. A. 1), although, where interest is required by the Constitution, interest to date of "final payment" must be allowed (*Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 303, 306).

4. *Multiplicity.*—Similarly the *Waterman* case specifically passed upon and rejected the argument that because appellant "would be subjected to a multiplicity of suits in order to recover the money due on the contracts" (327 U. S., at 545), it need not exhaust its administrative remedies. Indeed, even if there were sufficient multiplicity to serve as a basis for ordinary equity jurisdiction (as to which see pp. 35–36, *infra*), it would not overcome the statutory command that exclusive jurisdiction vest in the Tax Court. Cf. *Smallwood* v. *Gallardo*, 275 U. S. 56, 61–62;[14] *Di Giovanni* v. *Camden Insurance Association*, 296 U. S. 64, 69–70. As to the absence of actual danger of multiplicity of suits, see pages 9–10, *supra*.

5. *Payment in advance of administrative remedy.*—The same is true as to appellant's argument that the renegotiation order of the Board and the Tax Court can (to use this Court's language in the *Waterman* case) be enforced "without court enforcement proceedings" (327 U. S., at 545). The possibility that any amount found to be due could be withheld before the completion of the

[14] Although the multiplicity point is not specifically mentioned in this Court's opinion in the *Smallwood* case, it appears from the decision of the Circuit Court of Appeals for the First Circuit (16 F. 2d 545, 549) that multiplicity of suits was the alleged basis for equity jurisdiction. Hence this Court's statement (275 U. S., at 62) that the "general rule against injunctions [embodied in a specific statute for Porto Rico] * * * does not leave the taxpayer without power to resist an unlawful tax, whatever the difficulties in the way of resisting it" must have been intended to apply to an allegation of multiplicity.

statutory remedy, as the statute contemplates, was present in that case as well as in this one.

The cases differ in that here the administrative process has gone further than in *Waterman*. Here the Under Secretary of War has made a unilateral determination that appellant has realized excessive profits and fixed the amount thereof. But the administrative process is not completed, since the Tax Court has not rendered any decision on appellant's petition to hear the matter *de novo*.

In this case it is also alleged and admitted that, in addition to determining the amount of the excess, the appellees have threatened to direct appellant's customers to pay the amount of the excess profits to the United States rather than to appellant. This fact, appellant argues, makes the statutory remedy inadequate; it is further urged that the doctrine of exhaustion of administrative remedies applies only when the impact of the command is not felt until after the completion of the administrative process.

The possibility of a withholding prior to a final order of the Tax Court was implicit in the *Waterman* case, inasmuch as the opinion clearly indicates that judicial relief, if any, would have to await the Tax Court's ultimate decision, and since under Section 403 (e) (1) of the statute a renegotiation order may unquestionably be enforced while a proceeding is pending before the Tax Court. The opinion thus would seem to have

meant that, even if the Maritime Commission chairman had found excessive profits and ordered a withholding, an injunction suit would still not lie prior to the Tax Court's decision.

This result would clearly be correct even apart from the *Waterman* case. It may be that in some circumstances the exhaustion rule will not be applied if a party is not given adequate protection during the course of administrative proceedings (see cases cited *infra*, p. 31), although the Court has not permitted substitution of a court for an administrative body as a tribunal of original jurisdiction when the latter has been granted exclusive authority by statute. But a remedy is not regarded as inadequate because a party must pay money to the Government first, before litigating the validity of the payment, as long as the payment is recoverable if he prevails. As this Court knows, most taxes are paid pursuant to such a system of collection and subsequent refund, and there can be no question as to the constitutionality of such a scheme. See *Phillips* v. *Commissioner*, 283 U. S. 589, 593–597. Here if the sums due appellant are withheld for the account of the United States by other contractors, or if, in order to avoid litigation with its customers (see p. 39, *infra*), appellants should pay the Government directly, appellant could recover such amounts if the Tax Court, or any subsequent court in which appellant might have a right to relief, held the excess profit determination to be unlawful.

In this case, it is important to note, the exclusiveness of the administrative remedy does not rest merely on principles of equity or judicial administration but also on express statutory provisions. The Tax Court is granted exclusive jurisdiction over the subject of excessive profits much more specifically than was the Secretary of Agriculture given exclusive jurisdiction in the Agricultural Marketing Agreement Act considered by this Court in *United States* v. *Ruzicka*, decided December 16, 1946. In the *Ruzicka* case itself the respondents were ordered to pay sums demanded by the Market Administrator subject to an ultimate right of recovery if they brought, and prevailed in, an administrative proceeding with appropriate judicial review. The Renegotiation Act (Sec. 403 (e) (1)), like the Marketing Agreement Act, provided that the pendency of review proceedings shall not "stay the execution" and enforcement of the order under review. The *Ruzicka* case differs from the case at bar in that it was a suit by the Government for enforcement, not a suit to enjoin enforcement. But, *a fortiori*, if a party can not avoid the administrative process when the Government brings him to court in seeking compliance with an order, he can not do so by bringing a separate injunction suit of his own. The *Ruzicka* case demonstrates that a statute may make an administrative remedy exclusive even though the result may be payment in advance of final administrative determination of the amount

in controversy. It thus completely refutes appellant's argument that advance collection prevents Congress from making an administrative remedy exclusive.

6. *Initiation of Tax Court proceeding not sufficient to justify immediate resort to courts.*—Appellant argues that it has exhausted its remedy by filing its petition in the Tax Court, and that there is nothing further it can do. But Congress provided that the Tax Court should pass upon such matters, and unless and until the Tax Court passes adversely upon appellant's claim it cannot be known whether appellant will be forced to repay any excessive profits or need judicial relief. If the delay pending the Tax Court determination is prolonged, and harmful to appellant, appellant may ask that court to have the case expedited.[15] There is no allegation that such a step has been taken. If it should appear that the Tax Court is arbitrarily refusing to pass upon petitioner's claim—as has not been alleged—another court might properly order the Tax Court to act. But this would not justify substitution of a district court for the Tax Court as the tribunal of first instance. The possibility that appellant may be harmed by having to pay in advance the excessive profit found by the Under Secretary, thereby impairing its capital, even though the amount might ultimately be recoverable, does not

[15] Appellant's cases are scheduled for hearing by the Tax Court in the near future. See note 5, *supra*, p. 11.

warrant disregard of the statutory remedy. The same could doubtless be said in many tax cases, but the taxpayer must nevertheless pay in advance and then sue for refund.[16]

7. *Allegation of unconstitutionality does not defeat exhaustion principle.*—Finally, it may be suggested that the exhaustion of remedy doctrine does not apply when it is claimed that a statute is unconstitutional *in toto*, and on its face, as appellant contends here. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, among other cases,[17] settles that administrative remedies must be followed even though a constitutional question is raised. There the company was contending that the National Labor Relations Act could not constitutionally be applied to its operations. And this Court recently stated in *United States* v. *Ruzicka, supra*, that even when questions are "formulated in constitutional terms", the statutory procedure must be followed. We submit that the principle is the same whether the question relates to the constitutionality of the statute as

[16] See *State Railroad Tax Cases*, 92 U. S. 575, 614 ("hardship or injustice" not enough to allow injunction); *Pittsburgh &c Ry.* v. *Board of Public Works*, 172 U. S. 32, 39; *Shelton* v. *Platt*, 139 U. S. 591, 596; *Gouge* v. *Hart*, 250 Fed. 802, 806 (W. D. Va.), appeal dismissed, 251 U. S. 542.

[17] *Gorham Manufacturing Co.* v. *State Tax Commission*, 266 U. S. 265; *St. Louis-San Francisco Ry.* v. *Alabama Pub. Serv. Comm.*, 279 U. S. 560; *Dalton Machine Co.* v. *Virginia*, 236 U. S. 699; *McGregor* v. *Hogan*, 263 U. S. 234, 238; *First Natl. Bank* v. *Weld County*, 264 U. S. 450; *Lawrence* v. *St. L.-S. F. Ry.*, 274 U. S. 588; *White* v. *Johnson*, 282 U. S. 367, 373; cf. *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160.

applied in a particular case (*Myers* v. *Bethlehem Shipbuilding Corp.*, *supra*) or to the constitutionality of the act as a whole (*Lawrence* v. *St. L.-S. F. Ry.*, 274 U. S. 588; *White* v. *Johnson*, 282 U. S. 367, 373; cf. *Gorham Manufacturing Co.* v. *State Tax Commission*, 266 U. S. 265), which, of course, is relevant only as it pertains to the particular case (*White* v. *Johnson*, *supra*).

In the one situation, as in the other, an administrative decision in favor of the aggrieved party will terminate the proceeding without the determination of any constitutional question. The reasoning of *Alma Motor Co.* v. *Timken Co.*, No. 11, this Term, decided December 9, 1946, which held that a circuit court of appeals should pass upon nonconstitutional questions first in order to avoid dealing with constitutional issues unless absolutely essential to the disposition of the case, would seem even more clearly to require the courts to refrain from acting while the controversy is in the course of administrative determination. The undesirability of deciding a constitutional issue when the case may not call for it is supplemented by the recognized rule against unnecessary and premature judicial intervention in the administrative process.

It cannot be said that the Tax Court is unable to pass upon questions of constitutional stature. It does so in the tax field,[18] and there is no stat-

[18] *Independent Life Ins. Co. of America* v. *Commissioner of Internal Revenue*, 17 B. T. A. 757, affirmed, 67 F. 2d 470

utory impediment in the Renegotiation Act to its giving consideration to constitutional questions along with others.[19] Nor is there reason to doubt that it will be as independent in handling renegotiation cases as in tax cases. Though perhaps not technically classified as a judicial agency, the Tax Court has been declared by this Court to be a forum which "has established a tradition of freedom from bias and pressures," whose "procedures assure fair hearings," and whose "deliberations are evidenced by careful opinions". *Dobson* v. *Commissioner*, 320 U. S. 489, 498. And, as the Tax Court has itself recognized in *Stein Bros. Mfg. Co.* v. *Secretary of War*, 7 T. C. 863, 882, at least on constitutional questions there can be no doubt that its decisions would be subject to review by a judicial tribunal and ultimately by this Court.

(C. C. A. 6), reversed, 292 U. S. 371; *Keusch* v. *Commissioner of Internal Revenue*, 23 B. T. A. 216, appeal dismissed, 60 F. 2d 481 (C. C. A. 3), certiorari denied, 287 U. S. 641; *General Securities Corporation* v. *Commissioner of Internal Revenue*, 23 B. T. A. 130; *General Aniline & Film Corporation* v. *Commissioner of Internal Revenue*, 3 T. C. 1070; *Mertens on Income Taxation*, § 50.19.

[19] On September 26, 1946, the Tax Court passed upon and sustained the constitutionality of the Renegotiation Act. *Stein Bros. Mfg. Co.* v. *Secretary of War*, 7 T. C. 863, 876–882, relying on *Spaulding* v. *Douglas Aircraft Co.*, 154 F. 2d 419 (C. C. A. 9). This does not render it unnecessary for appellant to follow the statutory procedure. *Gilchrist* v. *Interborough Co.*, 279 U. S. 159, 207–209; *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 616–617. A person in the same position as the losing party in an identical case may not institute his case in the circuit court of appeals because it would come before the same district judge.

The reasoning to this effect of another three-judge district court in the District of Columbia in disposing of a case substantially identical to this one is quoted in the margin.[20]

In *Arrow Distilleries* v. *Alexander*, 24 F. Supp. 880, 882 (D. D. C.), affirmed on other grounds, 306 U. S. 615, a three-judge district court stated that although the National Labor Relations Act had been held constitutional prior to *Myers* v. *Bethlehem Shipbuilding Corp.*, "the rule applies even though the question of constitutionality is undecided".

There have been circumstances in which, because the effect of the statute itself was to cause

[20] See *Knowles* v. *Hirsch*, 65 F. Supp. 690, 691 (D. D. C.): "The plaintiff's plea of the statute's unconstitutionality is prematurely presented here, as it should be urged first in the Tax Court. That court, in tax cases, has passed upon constitutional questions heretofore, and its decisions concerning them have been appealed and the appeals so taken have been considered by the courts. While the Renegotiation Act provides that when the Tax Court has redetermined the amount of excessive profits there shall be no judicial review of its determination, it does not follow that a Tax Court decision concerning the constitutionality of the Act may not be reviewed by the courts. Since the Tax Court is an agency in the executive branch of the government, it does not have, and could not be given, final or exclusive jurisdiction to determine constitutional questions. The power to pass on the constitutionality of an act of the Congress is a prerogative of the judicial branch of the government. Constitutional questions under the Renegotiation Act are, in the first instance, part of the case before the Tax Court, but, as with questions of jurisdiction, the decisions of that court concerning them are appealable. Consequently, the plaintiff in the case at bar must first present his constitutional question to the Tax Court if he desires to obtain an adjudication concerning it."

irreparable injury irrespective of the outcome of the administrative process, this Court has passed upon the constitutionality of a law without requiring the use of administrative procedures. *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 592–595; *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 287; *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 386. It is to be noted that those cases involved only a question of equity jurisdiction, and not a statute in itself specifically giving the administrative agency exclusive jurisdiction, as is the case here. But, in any event, that exceptional treatment has not been applied where the injury consisted of the financial inconvenience of payment in advance and an action for refund. If that were not the case, a taxpayer would be able to circumvent the established system for collecting taxes in advance of a determination of legality whenever it was difficult for the taxpayer to do without the sum paid during the period of litigation. In *Cottman Co.* v. *Dailey*, 94 F. 2d 85 (C. C. A. 4), certiorari denied, 299 U. S. 566, an attempt was made to enjoin collection of a customs duty on the ground, *inter alia*, that the Antidumping Act was unconstitutional because of an invalid delegation of legislative power. The opinion of Judge Parker stated that where duties may be paid under protest and then recovered "the remedy provided by Congress is adequate even though the duties assessed be illegal or unconstitutional.

The mere fact that the act of Congress is alleged to be unconstitutional * * * does not present a case for equitable interference where such legal remedy is provided." (94 F. 2d at 89.)

8. *Act not unconstitutional in toto.*—In any event, no extended argument is necessary to show that the Renegotiation Act is not invalid *in toto.* The standard of "excessive profits", even apart from the enumeration of factors to be considered contained in Section 403 (a) (4) (A),[21] furnishes a guide to administrative action at least as specific as "public interest" (*New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 24; *United States* v. *Chemical Foundation,* 272 U. S. 1; *Avent* v. *United States,* 266 U. S. 127; *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 225–226), "unreasonable obstruction to navigation" (*Union Bridge Co.* v. *United States,* 204 U. S. 364), "just and reasonable" for rate-making purposes (*Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420; cf. Interstate Commerce Act,

[21] The first renegotiation statute of April 28, 1942 (Appendix, p. 1) contained no definition of excessive profits, although by the time the statute was amended in October 1942 (Appendix, p. 5), Congress had been apprised of the standards which the War Department was applying in interpreting the phrase. The Renegotiation Act of 1943 contained a detailed statement of the factors to be taken into consideration in determining what profits were "excessive." (Appendix, pp. 19–20.) The 1943 Act applies to fiscal years ending after June 30, 1943 (Sec. 403 (c) (6), Appendix, p. 33), and thus governs the renegotiation involved in this case. See pp. 7–8, *supra.*

Section 15, 49 U. S. C. 15), and "primarily" or substantially (*Federal Reserve Board* v. *Agnew*, No. 66, Oct. Term, 1946, decided January 6, 1947, slip sheet, p. 7)[22]. In *Yakus* v. *United States*, 321 U. S. 414, 425, the Court stated: "It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework." See also *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 145; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 398; *Spaulding* v. *Douglas Aircraft Co.*, 154 F. 2d 419, 423–426 (C. C. A. 9); *Stein Bros. Mfg. Co.* v. *Secretary of War*, 7 T. C. at 880–881.[23] Nor can there be any doubt that the Rene-

[22] The cases on which appellant apparently relies (Br., pp. 43–51) are not concerned with delegation of legislative power but with the definiteness of statutory language, unimplemented by any administrative action, as a standard for unlawful conduct.

[23] The *Spaulding* case, which upheld the Renegotiation Act itself, noted that "excessive profits" are determined by first ascertaining the standard of "reasonable profits", and deducting this from the total profit, and that the "reasonable profit" is not substantially different from the standard of "reasonable rates" used in the Interstate Commerce Act and other statutes. The *Spaulding* opinion also notes that the attention of Congress had been called to the means by which the general standard had been implemented by the War Department, so that the subsequent amendment of the statute was in effect a ratification of the standards being administratively applied (154 F. 2d at 423–425). Compare *Hirabayashi* v. *United States*, 320 U. S. 81, 91.

gotiation Act is an appropriate exercise of the war power in order to prevent undue war profiteering at the expense of the nation and thereby reduce the cost of the war. See *Spaulding* v. *Douglas Aircraft Co., supra,* 422–423, and cases cited; *United States* v. *Alexander Wool Combing Co.,* 66 F. Supp. 389 (D. Mass.); *Stein Bros. Mfg. Co.* v. *Secretary of War, supra,* at 877–878.

Appellant's constitutional objections to the absence of judicial review of Tax Court decisions, and to the lack of trial by jury, could not, even if meritorious, invalidate the entire statute. If judicial review should be found constitutionally necessary, the clause making determinations of the Tax Court not subject to review "by any court", (Section 403 (e) (1)) would alone be invalid, and a proper judicial remedy created. *Stein Bros. Mfg. Co.* v. *Secretary of War,* 7 T. C. at 882. Congress obviously would not have intended the entire statute to fall, thereby leaving contractors with their excessive profits, merely because of the necessity of permitting judicial review. The separability clause (Section 403 (g)) in itself manifests the congressional intention as to this. Cf. *Electric Bond and Share Co.* v. *Securities and Exchange Commission,* 303 U. S. 419, 434. Even more clearly, appellant's contentions as to the unconstitutionality of the statute when retroactively applied would not make the law entirely void; there would be ample room for

its prospective operation. Such a contention relates only to the validity of an application of the statute in a particular case, and is clearly not sufficient to avoid the doctrine that administrative remedies must be exhausted. Cf. *Macauley* v. *Waterman Steamship Corp., supra; Myers* v. *Bethlehem Shipbuilding Corp., supra.*

II

APPELLANT HAS AN ADEQUATE REMEDY AT LAW

In granting appellees' motions to dismiss the amended and supplemental complaint and for summary judgment, the court below held not only that the suit was premature but also that equity had no jurisdiction. The court below stated (R. 434) that "equity has no jurisdiction for the reason that the plaintiff has complete remedies by actions at law. It claims that certain parties are indebted to it by reason of certain contracts; the payment of these claims under a judgment at law would give a full, adequate and complete remedy." This holding, we submit, is clearly correct.

Appellant contends that, contrary to the holding of the court below, it would not have an adequate remedy at law by a suit against contractors to whom withholding orders had been issued, as its debtors are too numerous. In its brief (p. 114), appellant states it "would be required to sue sixteen or more of its customers." But this Court has held that the district courts have "no

power" to "grant the injunction sought," notwithstanding the possibility that the contractor "would be subjected to a multiplicity of suits in order to recover the money due on the contracts." *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540, 544, 545. Furthermore, the record does not support appellant's contention that withholding orders would be issued to sixteen or more of its customers, all of whom it would have to sue. As is shown by the affidavit of Maurice Hirsch (R. 117–118), the collection method to be adopted in this case will be the issuance of withholding orders to "two or possibly three" contractors doing business with the United States who owe various sums of money to the appellant. The affidavit also states that if this method of collection does not result in a discharge of the claim, a recommendation will be made to the Attorney General that suit be brought by the United States against appellant to compel payment of the claim (*ibid.*).

If withholding orders are issued to "two or possibly three" prime contractors, the appellant would have an adequate remedy at law in that he could bring action against one or more of such contractors to require the payment of whatever sums it believed to be owing. The contractor could set up by way of defense the withholding order which would afford adequate opportunity for a determination of the constitutionality of the Renegotiation Act, pursuant to the provisions of

which the withholding orders were issued. That such a suit would afford appellant an adequate remedy at law is fully sustained by the case of *Spaulding* v. *Douglas Aircraft Co.*, 154 F. 2d 419 (C. C. A. 9), decided March 13, 1946), in which such a suit was brought. The *Spaulding* case demonstrates not only that a subcontractor can sue his prime contractor and thereby obtain a forum for the consideration of all appropriate questions, but also that a single suit against any one prime contractor is sufficient to protect the subcontractor's rights. In such a suit a judgment may be sought declaring the Renegotiation Act, or a part thereof, to be unconstitutional. The United States can then intervene to present evidence and argument concerning the constitutionality of the statute and to defend the action taken by the renegotiating officials. If it were finally adjudged that the withholding for the account of the United States of the amount determined to have been excessive profits was unlawful and erroneous, that adjudication would no doubt support a refund under the Third Deficiency Appropriation Act, 1946, Public Law 521, 79th Cong., 2d Sess., approved July 23, 1946.

The availability of a comparable action in a suit at law on the contract prevents the assumption of jurisdiction by a court of equity. *Coffman* v. *Breeze Corporations*, 323 U. S. 316. This Court, in affirming the dismissal by a statu-

tory three-judge district court of the complaint in an injunction suit by a patent owner against his licensees, challenging the constitutionality of the Royalty Adjustment Act, stated (p. 322):

> Appellant does not in the present suit bring to our attention any facts showing or tending to show that a suit to recover a money judgment for the royalties would not afford complete and adequate relief without resort to an equitable remedy. In such a suit if appellee Breeze is obligated by the contracts in question to pay the royalties to appellant, it can discharge that obligation only by payment of the amount due, or by setting up the Royalty Adjustment Act as a defense. Compliance with the duty under the Act to pay into the Treasury the royalties withheld from appellant would operate by the terms of the Act as a discharge of the obligation to pay appellant. If that defense were offered, the constitutional validity of these provisions of the Act would be a justiciable issue in the case, since upon its adjudication would depend appellant's right of recovery.

It is the policy of the United States to intervene in any suit brought against a contractor who has been ordered to withhold amounts otherwise due a subcontractor. Since the Renegotiation Act provides (Section 403 (c) (2), Appendix p. 30) that "each contractor * * * is hereby indemnified by the United States against all

claims by any subcontractor on account of amounts withheld from such subcontractor pursuant to this paragraph", the United States would have the primary burden of defending the action, since it would be immaterial to the contractor who won the suit.

Appellant's brief refers repeatedly to the disastrous consequences to its business if it were forced to sue its customers to recover the amounts withheld. Inasmuch as such suits would undoubtedly be defended by the Government (as in *Spaulding* v. *Douglas Aircraft Co.*, 154 F. 2d 419 (C. C. A. 9)), which would be bound to reimburse the customer if appellant prevailed (Section 403 (c) (2)), and since the customer would realize that the suit was aimed at the Government and not at him, it may be doubted whether he would discontinue business relations because appellant made him the nominal defendant. But in any event appellant could avoid such consequences by paying the sums claimed to the Government directly. The sum would then be recovered if appellant prevailed in the Tax Court or elsewhere without the necessity of suits against customers.

It is submitted that there is no issue concerning the constitutionality of the Renegotiation Act or any of its provisions or their interpretation which cannot be raised in a single suit by a subcontractor against a contractor to whom a withholding order has been issued. The United

States would be legally bound by the ruling of such court on any issue raised and would be estopped from pursuing collaterally any action, administrative or in the courts, in contravention of the decision in that action. The United States, having once litigated any question with the appellant, would be precluded from litigating that question again. See *United States* v. *Moser*, 266 U. S. 236, 242; *Fishgold* v. *Sullivan Drydock & Repair Corp.*, No. 970, Oct. Term, 1945; Scott, *Collateral Estoppel by Judgment* (1942), 56 Harv. L. Rev. 1.

Furthermore, if the Government brought a suit against appellant to collect sums determined to be excessive war profits, appellant would clearly have an adequate remedy at law. *Tilbrook* v. *Forrestal*, 65 F. Supp. 1 (D. D. C.); *United States* v. *Alexander Wool Combing Co.*, 66 F. Supp. 389 (D. Mass.); *United States* v. *Pownall*, 65 F. Supp. 147 (S. D. Cal.); cf. *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160.

It is settled that the availability at law of a plain, adequate and complete remedy is fatal to the right to injunctive relief in any Federal court. *Hurley* v. *Kincaid*, 285 U. S. 95, 105; *Schoenthal* v. *Irving Trust Co.*, 287 U. S. 92, 94; *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 497; *Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276, 283. The issue raised in the complaint below as to the constitutionality of the Act does not affect these principles. "The fact that it would be convenient for the parties and the public to have

promptly decided whether the legislation is valid, cannot justify a departure from * * * established principles of equity practice" (Brandeis, J., concurring in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 345); see also *Arkansas Building Association* v. *Madden*, 175 U. S. 269, 274.

III

THIS IS A SUIT AGAINST THE UNITED STATES TO WHICH THE UNITED STATES HAS NOT CONSENTED

The defendants-appellees in this suit are the members of the War Contracts Price Adjustment Board, the Secretary of War and the Under Secretary of War. The amended and supplemental complaint seeks, among other things, "injunctive relief restraining the defendants and each of them from further proceeding under the Renegotiation Act" (R. 133).

Appellant's suit, it is to be assumed, is based implicitly upon the assumption that the United States, in whose name the conduct complained of is being carried out, is as a matter of law not so directly involved as to deprive the court of jurisdiction.[24] The theory must be that the appellees,

[24] Actually, appellant is laboring under no such misconception, and in its amended and supplemental complaint, paragraph 17 (9), explicitly recognized that this is a suit against the United States when it stated (R. 146):

"The Renegotiation Act violates Article III, Section 1 and Section 2 of the Constitution of the United States in that it authorizes the Executive branch of the Government of the United States to determine a controversy to which the United States is a party."

by virtue of exceeding their statutory authority, are acting or about to act as trespassers in the sense of violating some legally protected right of appellant, and that the overstepping of the statutory bounds strips the cloak of official authority from the appellees so that they act wrongfully as individuals rather than as agents of the Government. Cf. *Ex Parte Young*, 209 U. S. 123; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605.

The sovereign immunity extends to suits "against its officers, agents, and representatives, where the [sovereign], though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates." *In re Ayers*, 123 U. S. 443, 506; *Belknap* v. *Schild*, 161 U. S. 10, 25; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387. In *Louisiana* v. *McAdoo*, 234 U. S. 627, 632, the Court, in speaking of suits to review the official action of the Secretary of the Treasury as to the rate which should be exacted under his construction of the Tariff Acts, observed that such suits "would operate to disturb the whole revenue system of the Government and affect the revenues which arise therefrom. Such suits would obviously, in effect, be suits against the United States."[25] We submit that the suit below was one against the

[25] Cf. *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 296; *Hagood* v. *Southern*, 117 U. S. 52, 69; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 457.

United States, since a judgment rendered for the appellant would have a substantial impact upon the financial affairs of the sovereign.

This Court has recently applied the sovereign immunity doctrine in a suit against the Secretary of the Navy to enjoin one aspect of the renegotiation process. *Mine Safety Appliances Co. v. Forrestal*, 326 U. S. 371. There the renegotiation order had been issued, and the Secretary of the Navy sought to enforce it by withholding amounts otherwise due the contractor from the Government. A suit in the district court to enjoin such withholding was held barred as a suit against the United States because the effect of the relief sought would be to compel the payment of money from the federal treasury.

As is shown in the affidavit of Maurice Hirsch (R. 117–118), the Government intends to eliminate the excessive profits determined to have been realized by appellant, by issuing withholding orders to two or possibly three contractors who owe money to appellant. If this method of collection does not result in a discharge of the claim a suit will probably be brought by the Government against the appellant to compel payment of the claim. Both of these methods of collection are authorized by the Renegotiation Act (Sec. 403 (c) (2), Appendix, pp. 29–30), and it would seem that appellant requests that appellees be enjoined from proceeding in any of such ways to collect

the claim. That the United States is clearly a necessary party to this action is well illustrated by the fact that any suit brought against appellant to collect excessive profits would be brought in the name of the United States. Furthermore, any contractor who was directed to withhold sums owing to appellant would by the terms of the Renegotiation Act withhold such sums "for the account of the United States." Any such contractor withholding such sums is "indemnified by the United States against all claims by any subcontractor on account of amounts withheld from such subcontractor." All such monies recovered shall be covered into the Treasury as miscellaneous receipts. If the excessive profits determined to have been realized by the appellant had already been collected by one of the methods provided in the Renegotiation Act, then the *Mine Safety Appliances Company* case would be on all fours with the instant one. In this case judicial relief is sought at an earlier stage in the same type of proceeding. The same principle which would bar a United States district court from assuming jurisdiction where the alleged injury had actually occurred would, it would seem, similarly stand in the way of jurisdiction where the alleged injury was only threatened.

Nor is there any principle of law which restricts the sovereign immunity, where the suit is nominally against the Government office to cases where the relief sought would involve pay-

ment from the Government Treasury. Thus, in *Belknap* v. *Schild*, 161 U. S. 10, the effect of the injunction sought against the official (to prevent patent infringement) would have been to stop the Government's manufacture of an article needed by the Navy. Likewise, in *In re Ayers*, 123 U. S. 443, the injunction would have prevented State attorneys from bringing certain suits for the collection of State taxes. Again, in *Louisiana* v. *McAdoo*, 234 U. S. 627, equitable relief would have prevented the Secretary of the Treasury from collecting less than the alleged legal tariff.

It is submitted that this suit should have been dismissed, among other grounds, for the reason that it was a suit against the United States to which Congress had not consented. Congress has consented to suit in the Tax Court concerning questions arising under the Renegotiation Act, and, where constitutionally necessary, thereafter in other courts. Congress has not consented, however, to initial review of such questions by suit for a declaratory judgment and injunctive relief in the district courts. On the contrary, Congress has carefully sought to bar such jurisdiction by giving the Tax Court exclusive jurisdiction of such questions. Cf. *Ford Motor Company* v. *Department of Treasury*, 323 U. S. 459. The same principle which required dismissal of the suit in *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371, requires a dismissal of the instant proceeding.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

No. 95.—October Term, 1946.

Aircraft & Diesel Equipment Corporation, Appellant, *v.* Maurice Hirsch, E. D. McDougal, John R. Paul, et al.	Appeal From the District Court of the United States for the District of Columbia.

[June 16, 1947.]

Mr. Justice Rutledge delivered the opinion of the Court.

This case is the fourth in a series seeking here a determination of the invalidity, on constitutional grounds, of the First and Second Renegotiation Acts[1] and allied legislation.

In *Coffman* v. *Breeze Corporations*, 323 U. S. 316, and in *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, 330 U. S. —, the Royalty Adjustment Act[2] was attacked. The *Alma Motor* case was remanded to the Circuit Court of Appeals for a determination of the Act's applicability. The suit in the *Coffman* case was by a patent owner to restrain his licensees from paying accrued royalties to the Government pursuant to the Act's provisions. We held that the complaint had been rightly dismissed for want of equity jurisdiction, since the plaintiff had an adequate remedy at law by suit against its licensees, and also for want of a justiciable case or controversy.

In *Mine Safety Co.* v. *Forrestal*, 326 U. S. 371, a government contractor challenged the Renegotiation Acts.[3] The complaint sought to enjoin the Secretary

[1] The First Renegotiation Act was contained in § 403 of the Sixth Supplemental National Defense Appropriation Act, 56 Stat. 226, as amended, 56 Stat. 798, 982; 57 Stat. 347, 57 Stat. 564. The Second Renegotiation Act appears in the 1943 Revenue Act, 58 Stat. 21, 78, as amended 59 Stat. 294.

[2] Of October 31, 1942, 56 Stat. 1013, 35 U. S. C. §§ 89–96.

[3] See note 1.

of the Navy from taking action "which would stop payment by the Government of money lawfully in the United States Treasury to satisfy the government's and not the Secretary's debt to the appellant." 326 U. S. at 374. Accordingly we held that the Government was an indispensable party. Since it neither had been joined in the suit nor had consented to be sued in such a proceeding, it followed that the complaint had been properly dismissed.

In one other case, *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, constitutionality was not involved, but coverage of the Renegotiation Acts was put in issue. The suit was brought in a District Court for a declaratory judgment and to restrain further renegotiation proceedings affecting the specified contracts. The contractor had not sought a decision on coverage from the Tax Court. We held that the Tax Court has power to decide such questions in the proceedings authorized by § 403 (e) (1) of the Second Renegotiation Act. Hence, under the authority of *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, the complaint in the *Waterman* case also was held rightly to have been dismissed, in this instance for the plaintiff's failure to exhaust its administrative remedy.

Now the Aircraft & Diesel Equipment Corporation seeks a declaratory judgment that the First and Second Renegotiation Acts are unconstitutional on various grounds. Injunctive relief also is asked. And, in addition to the constitutional questions, determination is sought of issues of coverage and other matters.

The defendants, appellees here, consist of the members of the War Contracts Price Adjustment Board, the Secretary of War, and the Under Secretary of War.[4] Pur-

[4] The War Contracts Price Adjustment Board is created by § 403 (d) (1) of the Second Renegotiation Act, 50 U. S. C. App. § 1191 (d) (1). The present appellees were substituted by an order of the District Court as successors in office of the original defendants.

suant to the statutory requirement, 50 Stat. 751, 752, 28 U. S. C. § 380 (a), a district court of three judges was especially convened. After hearing, the complaint was dismissed.[5] One ground for this action was that the suit is premature, since proceedings were pending and undetermined in the Tax Court, pursuant to appellant's applications, for redetermination of its allegedly excessive profits for 1942 and 1943.[6] The court also held that it was without jurisdiction in equity, since in its view adequate remedy at law was available to Aircraft. Probable jurisdiction of the appeal was duly noted here.[7] 329 U. S. —.

We think the District Court correctly dismissed the complaint, and for the reasons stated as grounding its action. The issues expansively include almost all comprehended in the causes previously determined here. But the case reaches this Court in a posture differing in some substantial respects from that characterizing any of those proceedings. Hence it becomes necessary to set forth with some particularity the facts and controlling issues.

I.

Appellant is in the business of manufacturing diesel fuel injection equipment and precision parts, and aircraft precision parts. Its manufacturing activities, insofar as material,[8] were carried on under subcontracts with gov-

[5] 62 F. Supp. 520.

[6] See note 9. The Tax Court proceedings remain pending and undetermined at the date of this decision, although we are informed that the causes have been argued and submitted for decision.

[7] On appellant's application the District Court enjoined the defendants, pending determination of the appeal, from taking further action to enforce the statutes, particularly by notifying or requiring appellant's customers to pay into the Treasury of the United States moneys alleged to be due Aircraft under contract provisions, but claimed by appellees to be payable to the Government as excessive profits pursuant to the Acts' terms. Cf. notes 10, 13 *infra*.

[8] The amended complaint alleges that appellant supplied materials to the Department of the Navy under one contract made directly

ernment contractors. The contractor in turn furnished the completed aircraft or engines to the United States.

Pursuant to the First Renegotiation Act, the Secretary of War, acting through his delegate the Under Secretary of War, determined on October 27, 1943, that during the fiscal year ended November 30, 1942, appellant had realized excessive profits (less tax credits) amounting to $204,000. On April 29, 1944, the Under Secretary directed appellant's customers to withhold this sum from appellant. Thereafter it filed a petition with the Tax Court[9] for a redetermination of the alleged excessive profits. Nevertheless, on July 19, 1944, the Under Secretary further directed appellant's customers to pay the $204,000 into the Treasury of the United States, and this direction was obeyed.[10]

Following the fiscal year ended November 30, 1943, renegotiation proceedings were instituted under the Second Renegotiation Act. On January 11, 1945, the Under

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between it and the Government. But it is also alleged that appellant has been paid in full for these supplies. Apparently, therefore, the contract and the relation which it created between appellant and the Government have no bearing upon the issues in this cause.

[9] The First Renegotiation Act did not provide for redetermination by the Tax Court as originally enacted; nor did it specifically provide for review, by any body, of the determination of excessive profits. See Steadman, A Further Legal Inquiry Into Renegotiation: 1 (1944) 43 Mich. L. Rev. 1, 12. But Tax Court redetermination was afforded by the Second Renegotiation Act and was made retroactive. 50 U. S. C. App. § 1191 (e) (2) provides that it is available to "Any contractor or subcontractor . . . aggrieved by a determination of the Secretary made prior to the date of enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits."

[10] The original Act, as amended, provided: "Upon renegotiation the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract . . . (iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract. . . ." 56 Stat. at 983. See also note 13.

Secretary of War, as delegate of the War Contracts Price Adjustment Board, entered an order determining that appellant had realized excessive profits of $1,265,000. Deduction of tax credits reduced this amount to approximately $270,000. Appellant again filed a petition for redetermination with the Tax Court.[11] Then followed this suit.

The amended complaint is too lengthy for detailed summarization in this opinion. Apart from allegations going to constitutionality and coverage, including asserted defects in the renegotiation procedures followed,[12] the complaint sought to establish jurisdiction in the District Court, equitable in character, by showing the inadequacy of all available legal or other remedies. These included the pending Tax Court proceedings, possible suit in the Court of Claims following completion of the Tax Court's determination, and actions at law against appellant's customers, contractors with the Government, to recover the amounts said to be due under their various contracts.

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[11] An earlier petition was dismissed on motion of the United States because it was filed during the time when the War Contracts Price Adjustment Board might have initiated a review. Cf. *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540. After dismissal of the earlier petition and before filing of the later one, appellant had sought redetermination, pursuant to § 403 (e) (1) of the Second Renegotiation Act, by the War Contracts Price Adjustment Board. The Board denied review and adopted the Under Secretary's redetermination as its own.

[12] For example, in addition to contentions that the Renegotiation Acts as a matter of substantive law violate Article I, § 1, of the Constitution in that they constitute unlawful delegations of legislative power as well as contravene the due process and just compensation provisions of the Fifth Amendment, the jury trial provision of the Seventh Amendment, and the Tenth Amendment, it is said that the order under the Second Renegotiation Act was based in part at least on information said to have been obtained from "governmental and other reliable sources" which the appellant has had no opportunity to examine or rebut.

In particular it was alleged that, notwithstanding the pendency of the Tax Court proceedings, the Board and the Secretary, or his delegates, were taking steps to prevent Aircraft's customers from paying over to it moneys owing on contracts, aggregating $270,000, and claimed to be due the Government as excessive profits. The complaint alleged further that the Board and the Secretary were threatening to direct Aircraft's customers to pay these sums into the Treasury [13] and that, unless they were restrained, such payment would be made, to appellant's irreparable injury.[14] No direct relief was asked, by way

[13] Section 403 (c) (2) of the Second Renegotiation Act, 50 U. S. C. App. § 1191 (c) (2), provides: "Upon the making of an agreement, or the entry of an order, under paragraph (1) by the Board, or the entry of an order under subsection (c) by The Tax Court of the United States, determining excessive profits, the Board shall forthwith authorize and direct the Secretaries or any of them to eliminate such excessive profits (A) by reduction in the amounts otherwise payable to the contractor under contracts with the Departments, or by other revision of their terms; or (B) by withholding from amounts otherwise due to the contractor any amount of such excessive profits; or (C) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to a subcontractor, any amount of such excessive profits of such subcontractor; or (D) by recovery from the contractor, through repayment, credit, or suit any amount of such excessive profits actually paid to him; or (E) by any combination of these methods, as is deemed desirable. . . ."

[14] The allegations included the following: "Notwithstanding the fact that the plaintiff has filed its petition for redetermination in The Tax Court of the United States whereby it seeks an orderly determination of the amount, if any, it may owe to the United States of America, as excessive profits for its fiscal year ending November 30, 1943, the War Contracts Price Adjustment Board, purporting to act under the provisions of Section 403 (c) (2) of the Renegotiation Act, purposes to direct the defendant Henry L. Stimson, Secretary of War, or his delegates, to direct contractors, customers of the plaintiff, to withhold moneys due to the plaintiff by such contractors for the account of the United States, in amounts determined by it, the War Contracts Price Adjustment Board, to be due as excessive profits, and Henry L. Stimson, Secretary of War, or his delegates

of judgment or decree, for refund of the $204,000 collected by the Government from appellant's customers, pursuant to the First Renegotiation Act, as excessive profits realized in 1942. It was suggested, however, that if that Act should be found invalid and the Second Act sustained,[15] the Government should be permitted to collect only the difference between $270,000, the amount determined to be excessive profits for 1943, and the $204,000 collected for 1942. The suggestion, of course, if formally made, would be substantially a claim against the Government by way of setoff of the latter amount. Cf. *Mine Safety Co.* v. *Forrestal, supra.*

The Government has contested each of appellant's claims. But its primary contentions have been aimed at Aircraft's jurisdictional showing. It argues that the suit in substance and legal effect is one against the United States, to which there has been no governmental consent, cf. *Mine Safety Co.* v. *Forrestal, supra;* that the suit is premature, because the Tax Court proceedings have not been completed and until this has been done Aircraft will not have exhausted its administrative remedy, cf. *Macauley* v. *Waterman S. S. Corp., supra;* that the Tax Court has been given exclusive jurisdiction in renegotia-

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purposes to follow such directions of the War Contracts Price Adjustment Board and further to direct such contractors to pay such sums of money into the Treasury of the United States, in accordance with the procedure adopted by Henry L. Stimson, Secretary of War, acting through his delegate, Robert P. Patterson, in respect of excessive profits found by him to be due for the fiscal year of the plaintiff ending November 30, 1942, as heretofore, recited in this complaint, before The Tax Court of the United States of America shall have made or shall have had opportunity to make any determination of the plaintiff's petition for a redetermination of its excessive profits, if any, for its fiscal year ending 1943." See also note 42.

[15] The omission from the First Act of various provisions contained in the Second, see note 9 *supra*, is alleged to afford basis for invalidating the former even though the latter may be held constitutional.

tion matters; and that, in any event, there is no jurisdiction of an equitable character in the District Court, to afford the relief appellant seeks, since it has an adequate remedy at law by suit upon its contracts to recover any amounts due from its customers, in which all questions of constitutionality may be determined. Cf. *Coffman* v. *Breeze Corporations, supra.*

In the latter connection appellee Hirsch, as chairman of the Board, has filed an affidavit admitting that he and the other appellees, unless restrained, will take steps, as appellant alleges, to prevent payment of the $270,000 by its customers to it, and also to secure payment of that sum into the Treasury. The affidavit sets forth, however, that direction for payment will not be required or made as to more than two or three of appellant's customers and, in the event this does not result in payment of the full amount, the Government will proceed to collect whatever may remain by suit against appellant.

Aircraft, on the other hand, both in the amended complaint and by the supporting affidavit of its president, alleged that no such sum as $270,000 was owing to it from, or could be collected by direction to, any two or three of its customers. Rather it was set forth that collection of any such amount could be made only by direction to some sixteen or more customers. And on the same basis it is asserted that Aircraft's remedy by suit against its customers would require institution of numerous actions in different jurisdictions, resulting in expense and delay, as well as loss of good will and incurring the continued risk of the customers' solvency.[16] Accordingly Aircraft claims that jurisdiction in equity is conferred upon the District Court both by reason of the multiplicity of suits involved in asserting the legal remedy by actions against its customers and because of the injurious consequences which would follow from pursuing that course.

[16] See note 42 *infra.*

II.

We do not find it necessary to undertake determining the threshold question whether the suit is one against the United States. Were the issue squarely presented as a formal claim for refund or setoff concerning the $204,000 collected by the Government for 1942, the case in that aspect would be very close to *Mine Safety Co.* v. *Forrestal, supra.*[17]

We do not tarry, however, to consider further this feature of the case, since the absence of formal and specific claim in the nature of setoff or otherwise indicates, we think, a strategic decision to avoid the difficulties which would follow upon its definite and unequivocal assertion, on the score of the nature of the suit as being one in fact and function against the Government. Something more than a mere suggestion of claim or relief is required to bring into play judicial power of affording remedy, especially when it appears there may be good reason deliberately accepted for going no farther. This is reinforced when the suggestion, if acted on, would involve the Court in decision of serious constitutional questions. They are not to be entertained upon dubious presentations or, most certainly, when the presentation reasonably may be taken as not intended to put them forward squarely and inescapably. Cf. *Rescue Army* v. *Municipal Court*, 331 U. S. —; *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, 330 U. S. —. Accordingly we put to one side the lengthy

[17] Although asserted by way of equitable setoff, the effect of allowing such a claim would be, as we said in the *Mine Safety* case, to prevent the Secretary from taking certain action which, though it would not "stop payment by the government of money lawfully in the United States Treasury to satisfy the government's and not the Secretary's debt to the appellant," nevertheless would amount to "an indirect effort to collect a debt allegedly owed by the government in a proceeding to which the government has not consented," 326 U. S. 374, 375, and to which, as in that case, it has not been made formally a party.

allegations concerning the 1942 determination, and confine our consideration to the issues relating to the redetermination made for the fiscal year of 1943.

These also, the Government urges, substantially are effective to make the suit one against the Government, to which it has not consented. And for this view, likewise, it relies upon the *Mine Safety* decision, as well as others.[18] Appellant undertakes to distinguish the cases upon the basis that in the *Mine Safety* case the official action sought to be enjoined was conduct effective to stop the payment of funds out of the Treasury, whereas here the analogous conduct affects no funds in the Government's actual possession but seeks only to touch moneys held by third persons for appellant's or the Government's account. The difference, it is urged, is between action affecting only the withholding of government moneys and action effective to bring about collection from third persons of moneys claimed to be due to the Government.

That difference indeed may be substantial. But we do not decide whether it is sufficient to enable the appellant to avoid the difficulty presented of foreclosing the Government's claim by a suit brought only against its officials, essentially as trespassers,[19] without joining the Government itself. In other words, we do not determine whether the suit is, in legal effect, one against the Govern-

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[18] Especially *Louisiana* v. *McAdoo*, 234 U. S. 627; *Belknap* v. *Schild*, 161 U. S. 10; *In re Ayers*, 123 U. S. 443.

[19] Appellant's claim is that ordering its customers not only to withhold funds due to it under the contracts but also to pay them into the Treasury would be, in effect, a "trespass upon its property" within the rule of *United States* v. *Lee*, 106 U. S. 196; cf. *Land* v. *Dollar*, 330 U. S. —, and that execution of such orders would deprive it of vested property rights, contrary to various constitutional provisions. Since a decision of the constitutional issues would determine the Government's right to the funds, in any event, the case, like *Land* v. *Dollar*, *supra*, would seem to be one "where the question of jurisdiction [as involving the Government's immunity to suit] is dependent on decision of the merits." 330 U. S. at —.

ment, since in our opinion the other grounds going to the District Court's jurisdiction are adequate to sustain its dismissal of the cause.

Ordinarily of course issues relating to exhaustion of administrative remedies, as a condition precedent to securing judicial relief, and to the existence of jurisdiction in equity are either separate or separable matters, to be treated as entirely or substantially distinct. The one generally speaking is simply a condition to be performed prior to invoking an exercise of jurisdiction by the courts. The other goes to the existence of judicial power in the basic jurisdictional sense. In this case, however, the exhaustion problem and that of equity jurisdiction are closely, indeed inseparably, related. And both are colored by the relevant specific provisions of the Renegotiation Acts, more particularly the Second, since it alone provides for Tax Court redetermination.[20]

In *Macauley v. Waterman S. S. Corp., supra*, we were called upon to consider the relation between the Tax Court proceedings, as provided by § 403 (e) (1), and judicial proceedings instituted in the district or other courts of the United States in regard to renegotiation matters. Section 403 (e) (1) authorizes "any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by" him, to file a petition for redetermination with the Tax Court within ninety days after notice of the order is mailed.[21] The section then provides:

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[20] The provision, however, applies to determinations made prior to the Act's effective date. See note 9 *supra*.

[21] Otherwise the Board's order becomes final. § 403 (c) (1). The provision reads: "In the absence of the filing of a petition with the Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e) (1), such order shall be final and shall not be reviewed by any court or other agency."

Similarly, a limitation of one year is placed upon "all liabilities of the contractor or subcontractor for excessive profits received or accrued" during each fiscal year. See § 403 (c) (3).

> "Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency."

The section expressly states that the proceeding "shall not be treated as a proceeding to review the determination of the Board,[22] but shall be treated as a proceeding de novo." And the Tax Court is given the same powers and duties, "insofar as applicable," respecting "the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers," together with other procedural matters, as the court has under specified sections of the Internal Revenue Code in redetermining a deficiency in taxes. Moreover, § 403 (e) (1) commands: "The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c) (2)."

In the *Waterman* case, taking account of these provisions, we said: "The legislative history of the Renegotiation Act, moreover, shows that Congress intended the Tax Court to have exclusive jurisdiction to decide questions of fact and law,[23] which latter include the issue raised here of whether the contracts in question are subject to the Act." 327 U. S. at 544. "To grant the injunction sought," the opinion continued, "the District Court would have to decide this issue in the first instance. Whether it ever can do so or not, it cannot now decide questions

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[22] See note 11 *supra*.

[23] Citing, at 90 Cong. Rec. 1355, the statement of a sponsor in the House that the Tax Court could decide "all questions of fact and law. . . ." See also notes 30, 35 *infra*.

of coverage when the administrative agencies [24] authorized to do so have not yet made their determination. Here just as in the *Myers* case, the administrative process, far from being exhausted, had hardly begun. The District Court consequently was correct in holding that it lacked jurisdiction to act." *Ibid.*, 544–545.

The *Waterman* case differed from this one in three respects. There the appellant had "hardly begun" the administrative process, while here Aircraft has done all that it can do. The Waterman Corporation had contracted directly with a government agency, the Maritime Commission. Here the appellant is a subcontractor, a difference of some importance in the matter of jurisdiction in equity later to be noted. The *Waterman* case, as we have said, raised only questions of coverage, not issues of constitutionality. Here both types of question are presented. On the other hand, the cases are substantially identical in the nature of the relief sought. Each complaint asked for a declaratory judgment upon the legal issues and for injunctive relief restraining further action looking toward application of the Act's provisions.

We do not think the differences mentioned are sufficient to distinguish the cases for purposes of applying the exhaustion rule. Certainly no such effect can be derived from the fact that in the *Waterman* case the plaintiff had not begun the administrative process, while here Aircraft has gone as far as it can. The doctrine, wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, of pursuing them to their appropriate conclusion and, correlatively, of awaiting their final outcome before seeking judicial intervention.

[24] The Waterman S. S. Corporation not only had failed to file a petition with the Tax Court but also had refused to attend renegotiation conferences with the Board or to supply information sought by it.

The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings. Where Congress has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene either in presumed accordance with Congress' will or because, for constitutional reasons, its will to exclude them has been exerted in an invalid manner. To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action. It would nullify the congressional objects in providing the administrative determination. In this case these include securing uniformity of administrative policy and disposition,[25] expertness of judgment, and finality in determination, at least of those things which Congress intended to and could commit to such agencies for final decision.

There can be no doubt whatever, in view of the legislative history, that Congress had each of these ends in view when it provided for the Tax Court proceedings, as well as for action by the Board prior to that stage. Indeed the Board was created in large part to bring under a single aegis the last stage of informal renegotiation before the Tax Court action, in order thus to secure as nearly as possible uniform policy and administration of renegotiation problems.[26] This policy was followed and reinforced

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[25] See note 26 *infra*.

[26] See 89 Cong. Rec. 9928–9929. Previously the governmental departments concerned with renegotiation had set up a central board to effect a "more uniform policy in the determination of excessive profits," H. Rep. 871, 1st Sess., 75, but there was dissatisfaction with the board thus voluntarily established, see 89 Cong. Rec. 9934, and

in the provision for Tax Court redetermination. And that procedure was chosen deliberately in preference to judicial review in the Court of Claims or elsewhere, primarily because of the Tax Court's [27] expertness in fiscal matters analogous to those arising in connection with renegotiation problems,[28] as well as its essentially judicial procedures and experience.[29]

It is equally clear that Congress intended to endow the Tax Court's decisions with a very large degree of finality, as appears from the very terms of § 403 (e) (1), from the whole structure of the Act, and from the legislative history.[30] The express command of § 403 (e) (1) is not simply that the Tax Court shall have "exclusive jurisdiction,

"insistence in Congress that coordination between the departments having renegotiating authority under the prior act be not a matter of voluntary cooperation but one of statutory necessity." Steadman, A Further Legal Inquiry Into Renegotiation: I (1944) 43 Mich. L. Rev. 1, 6.

[27] See 53 Stat. 158, as amended by 56 Stat. 957, 26 U. S. C. § 1100: "The Board of Tax Appeals (hereinafter referred to as the 'Board') shall be continued as an independent agency in the Executive Branch of the Government. The Board shall be known as The Tax Court of the United States and the members thereof shall be known as the presiding judge and the judges of the Tax Court of the United States."

[28] See H. Rep. 871, 78th Cong., 1st Sess., 77; Steadman, A Further Legal Inquiry Into Renegotiation: II (1944) 43 Mich. L. Rev. 235, 270; cf. S. Rep. 627, 78th Cong., 1st Sess., 109; H. Rep. 1079, 78th Cong., 2d Sess., 83.

[29] *Dobson* v. *Commissioner*, 320 U. S. 489, 498; cf. note 27.

[30] "That court will have exclusive jurisdiction, by an order, to make a final determination as to whether excessive profits have been received or accrued, or whether a fair price has been determined, and The Tax Court's determination may not be reviewed or redetermined by any other court or agency." H. Rep. 871, 78th Cong., 1st Sess., 77. See also 89 Cong. Rec. 9930: "The committee has provided that any contractor aggrieved by a determination of excessive profits under the old law, whether he was cooperative and signed a closing agreement or not, may have a review of that determination in the Tax Court of the United States and in the review have all issues, constitutional and otherwise, decided by the court."

by order, to finally determine" the amount of excessive profits, if any. It is also that the determination "shall not be reviewed or redetermined by any court or agency." This is buttressed by the prohibition that filing the petition shall not operate to stay execution of the Board's order under § 403 (c) (2).[31] And not irrelevant to the statute's general policy of finality are the provisions making the Board's determinations final, if the petition for Tax Court redetermination is not filed in the specified time, and those of the Secretary or his delegates final if similar action is not taken to secure redetermination by the Board. § 403 (c) (1).

True, the statute expressly confers rights to follow through the various stages of the procedure to the end of the Tax Court phase. Nevertheless its entire structure indicates the congressional purpose to have matters of renegotiation promptly and expeditiously settled; and to accomplish this as far as possible both by informal negotiations and by introducing the compulsion of finality at every stage unless each succeeding one is taken as commanded.

At the height of the war Congress recognized, as did the procuring agencies,[32] that speed in procurement, and consequently in production of war materials, outweighed all other considerations normally applicable. And while re-

[31] See note 13 *supra*.

[32] The record contains an affidavit made by Robert P. Patterson when Under Secretary of War which reads in part: "Wartime procurement for the military establishment differs radically from procurement in times of peace. Speed in production at once becomes all-important. . . ."

". . . the war procuring agencies cannot use normal methods of procurement. The pressing need for speed requires the abandonment of drawn-out negotiation and the careful surveys of all relevant factors which sound purchasing would otherwise require. Competition necessarily wanes and no longer offers an adequate guide to the prices which should be paid. Above all, the forecasting of costs of production becomes, in large measure, a matter of informed guessing rather than of real cost analysis."

negotiation was a product of that necessity rather than a cause, the problems it raised were time consuming and closely related to pricing difficulties.[33] Often they worked to hinder and delay the process of procurement. Congress theretofore sought, so far as possible, to relieve the interrelated processes from the tedious burden of litigation. It did this by writing the policy of finality into the Act's provisions at each successive procedural stage, although saving the right of resort eventually to the Tax Court to those acting promptly in the prescribed way.

We do not express any opinion, indeed we explicitly reserve decision, upon the question of the finality of Tax Court decisions in these matters. But we cannot infer from a statute so conditioned in background, purpose, terms and compulsion derived from the inevitable circumstances of its application that Congress intended to allow skirting the procedures devised altogether or partially, more particularly in any case where following them could result in no greater loss than the delay and inconvenience which would flow from inability to seek some other remedy not dependent upon their completion.

We are not forced in this case, however, to decide whether Congress intended to give the Tax Court the last word upon all questions of fact and law, or whether it could do so if that were surely its purpose. Nor need we become involved in an attempt to decide what particular questions it might have left, or did leave, for that body's final and conclusive disposition. For it seems obvious, in view of the Act's terms, history, objects and the policies incorporated, that Congress clearly and at the very least intended the Tax Court's functions not only to be put in motion but to be fully performed, before judicial intervention should take place at the instance of one in appellant's position.

[33] The Second Renegotiation Act separated the repricing authority from renegotiation. See 58 Stat. 92, 50 U. S. C. App. § 1192. See also S. Rep. 627, 78th Cong., 1st Sess., 37–38.

This indeed was the ruling of the *Waterman* case. And we do not think the effect of that ruling is exhausted simply because constitutional questions were not raised there, but have been put forward in this cause. Nor is it overcome, in our judgment, by the showing which has been made on this record of irreparable injury and of the need as well as the power of equity to forestall the complete operation of the congressionally prescribed procedure.

On the contrary, whatever may be true of other situations,[34] in this case the very fact that constitutional issues are put forward constitutes a strong reason for not allowing this suit either to anticipate or to take the place of the Tax Court's final performance of its function. When that has been done, it is possible that nothing will be left of appellant's claim, asserted both in that proceeding and in this cause, concerning which it will have basis for complaint.

The Tax Court may decide entirely in appellant's favor. Indeed, if it can sustain there the claims and issues it offers to support here, that possibility is not an unlikely one. For, apart from the questions of constitutionality and of the Tax Court's power to decide them finally or otherwise, appellant has put forward, in both proceedings,[36] claims of exemption and noncoverage relating to contracts involving much larger amounts than the aggregate sums affected by renegotiation, after deduction of tax credits.[37]

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[34] See note 38 *infra*.

[35] See notes 23, 30 *supra*; cf. *Helvering* v. *Independent Life Ins. Co.*, 292 U. S. 371, reversing 67 F. 2d 470, affirming 17 B. T. A. 757; *Stein Bros. Mfg. Co.* v. *Secretary of War*, 7 T. C. 863.

[36] A copy of the petition for redetermination filed in the Tax Court by appellant has been attached as an exhibit to the complaint.

[37] Appellant in its complaint alleged, for example, that although for the fiscal year ending November 30, 1943, its total sales amounting to $3,548,845.50 were renegotiated, "only $2,207,574.95, in any event, were subject to renegotiation; that $1,312,250.07 of its total sales were of 'Standard Commercial Articles' as defined in the Renegotiation

And if those claims are well founded, as to which of course we express no opinion, the Tax Court's determination of these matters of coverage, which we held in the *Waterman* case are initially at least for its disposition, well might render consideration of the constitutional questions by it unnecessary and this cause moot.

Certainly that possible outcome should not be anticipated, either here or by the District Court, through a decision in this case on the constitutional issues. *Rescue Army* v. *Municipal Court*, 331 U. S. —. No more should it be forestalled by decision upon the matters of coverage. *Macauley* v. *Waterman S. S. Corp.*, *supra*.

It is true that the presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flowing from delay incident to following the prescribed procedure, has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention.[38] But, without

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Act; were articles sold under competitive conditions affecting the sale thereof in a manner which reasonably protected the Government against excessive prices, and, as such, were not subject to renegotiation; that $29,020.48 of its total sales were not sold for the ultimate use of the United States of America or any department, agency or instrumentality thereof, but were made and sold for civilian use, and, as such, were not subject to renegotiation."

[38] Thus, the Court has permitted resort to a federal court of equity where a state was enforcing confiscatory rates and by its law precluded a stay or supersedeas until the state courts "acting in a legislative capacity" had taken final action. *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290; *Pacific Tel. & Tel. Co.* v. *Kuykendall*, 265 U. S. 196; *Porter* v. *Investors Syndicate*, 286 U. S. 461. For other decisions holding that a federal court may exercise its equitable jurisdiction where there is an inadequate state remedy to correct a constitutional wrong, see *Hillsborough* v. *Cromwell*, 326 U. S. 620; *Wallace* v. *Hines*, 253 U. S. 66.

The rule has been applied most frequently in respect to state rather than federal administrative action, though of course it is not inap-

going into a detailed analysis of the decisions, this rule is not one of mere convenience or ready application. Where the intent of Congress is clear to require administrative determination, either to the exclusion of judicial action or in advance of it, a strong showing is required, both of inadequacy of the prescribed procedure and of impending harm, to permit short-circuiting the administrative process. Congress' commands for judicial restraint in this respect are not lightly to be disregarded.

More especially is this true with legislation of this type, adopted during and to meet the emergency of war and resting, at least in part, upon war powers. For, in such cases, "only if we could say in advance of resort to the statutory procedure that it is incapable of affording due process to petitioners could we conclude that they have shown any legal excuse for their failure to resort to it or that their constitutional rights have been or will be infringed," *Yakus* v. *United States*, 321 U. S. 414, 435, a statement implicitly requiring exhaustion, not merely initiation, of the statutory procedure.

We need not decide in this case, however, whether mere doubt concerning the adequacy of administrative or other relief would be sufficient for allowing anticipation of the administrative determination. For that course is not to be followed if there is another remedy, not inconsistent with the congressional command, and of certain character, even though it be neither so expeditious or convenient as some other sought to be substituted which circumvents that command. To this of course should be added the further qualification that following the prescribed remedy, upon the showing made, will not certainly or probably result in the loss or destruction of substantive rights.

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plicable to the latter, notwithstanding the power of Congress to regulate the jurisdiction and procedure of the federal courts may present obstacles to its application not present in state cases.

This brings us to consideration of the showing made here in support of equity's intervention. That showing, we think when considered in the light of the foregoing principles and of the statute's clear purpose and intent is not sufficient.

Whatever may be the scope allowed generally for equity to intervene upon the ground of inadequacy of legal remedies, where no explicit congressional command exists for following a prescribed procedure, the problem when such a mandate is present is entirely different from one tendered in its absence. The very fact that Congress has made the direction must be cast into the scales as against the factors which, without that fact, would or might be of sufficient weight to turn the balance in favor of allowing utilization of equity's resources. That fact itself may be of such weight as to turn the scales the other way, even in situations much more doubtful than the present one. In short, the so-called general principles governing the exercise of jurisdiction in equity are not to be taken, in such a case, as isolated from all effect of the legislative mandate or necessarily or even readily as overriding it.

In the first place, there can be no doubt of the availability or indeed of the certainty and effectiveness of appellant's remedy at law by suit upon its contracts against its customers claimed to owe it money under those agreements. Suits of that character are not forbidden, either expressly or impliedly by the Renegotiation Acts. Nor are they made dependent upon completion of the Tax Court proceedings.[39] Moreover we know of no reason

[39] It is unnecessary to consider whether in such a suit a district court should find it proper to defer its final decision until after the Tax Court had made its final redetermination, in order possibly to avoid the necessity of deciding the constitutional questions. Cf. *American Federation of Labor* v. *Watson*, 327 U. S. 582, 599, and cases cited. For, even in the event of such action, the court would have power to preserve, pending the administrative decision, the *status quo* and all

why every question of constitutionality which has been raised in this suit could not be presented and determined in such a suit.

In addition, there is special reason in the statutory provisions why that course should be followed rather than allowing the present suit. Appellant is, as we have pointed out, a subcontractor, not a contractor with the Government. While its suit could be instituted directly only against the contractor with whom it had dealt, nevertheless it is hardly conceivable that the Government would permit the suit to go to final judgment without intervention by it or, at the least, undertaking the responsibility for making the defense. For by § 403 (c) (2)[40] it is expressly provided: "Each contractor and subcontractor is hereby indemnified by the United States against all claims by any subcontractor on account of amounts withheld from such subcontractor pursuant to this paragraph."

In the face of this indemnity, the contractor becomes substantially a stakeholder as between the Government and the subcontractor, and the latter's suit against the contractor, if terminated favorably to the complainant, would obligate the Government to indemnify or reim-

rights of the appellant. The provision in § 403 (c) (1) that the filing of a petition with the Tax Court "shall not operate to stay the execution of the order of the [War Contracts Price Adjustment] Board" under § 403 (c) (2) does not mean that the courts are deprived of their power to grant stays where necessary. "Where Congress wished to deprive the courts of this historic power, it knew how to use apt words. . . ." *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U. S. 4, 17. It did so in the Emergency Price Control Act of 1942, 56 Stat. 23; see *Yakus* v. *United States*, 321 U. S. 414, 429, 437, using very explicit language. Here the provision literally at any rate appears to mean only that there shall be no automatic stay by virtue of filing the petition in the Tax Court.

[40] The paragraph covers withholding payment pursuant to direction by the Board to the contractor, for the account of the United States. See note 13 *supra*.

burse the contractor for the liability thus incurred. In effect, the Government has consented to suit by the contractor in the Court of Claims on account of any liability the contractor incurs by virtue of lawful payment of the subcontractor's claims.

Accordingly, there would seem to be no substantial reason for regarding the suit against the contractor as inherently inadequate or ineffective for the protection of any rights of the appellant, including constitutional ones. In this respect the case stands identically with *Coffman v. Breeze Corporations, supra.*[41] If any such inadequacy exists, it must be by virtue of factors extraneous to the nature of the suit itself and not present in the *Coffman* case.

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[41] The situation of the licensor in the *Coffman* case, with reference to the remedy by suit against its licensees was exactly the same as appellant's situation here in respect to suit against its customers, the contractors with the Government. We said, as to the adequacy of that remedy: "But whether the provisions of the Act be valid or invalid appellant shows no ground for equitable relief. If valid they would be a defense, and appellant would be entitled to no relief other than that afforded by the suit against the Government authorized by § 2 of the Act. If invalid, appellant's right to recover remains unimpaired. The sufficiency of the defense may be as readily tested in a suit at law to recover the royalties as by the present suit in equity to enjoin payment of the royalties into the Treasury. In either case appellant would receive all the relief to which it shows itself entitled." 323 U. S. at 323.

The *Coffman* decision stood squarely upon the grounding of the adequacy of the remedy by suit against the licensees, although it rested also upon the alternative ruling that there was no case or controversy. This was for the reason that the appellant asserted no right to recover the royalties, but asked only a determination that the Royalty Adjustment Act was unconstitutional "and, if so found, that compliance with the Act be enjoined, an issue which appellee . . . declines to contest." This, we said, made the prayer of the bill "but a request for an advisory opinion as to the validity of a defense to a suit for recovery of the royalties." 323 U. S. at 323, 324.

These appellant seeks to establish in its showing relating to multiplicity of suits and irreparable injury. Apart from multiplicity, the showing concerning injury certainly would not be sufficient to justify eliminating the Tax Court proceeding.[42] Boiled down, the allegations come to appellant's assuming, for the period necessary to secure either the Tax Court's decision or final judgment in suits against its customers directed to withhold, the continued risk of their solvency, without specific allegation that any of them is seriously so threatened or facts to support such a claim; and to deprivation, for the same period, of the use of $270,000 directed to be withheld.[43] We do not think this showing alone without regard to multiplicity, approaches what would be required to sustain the interven-

[42] It is alleged that appellant, unless allowed to maintain this suit, will be caused unnecessarily to run the risk of impaired credit or insolvency of customers directed to withhold funds; that its working capital essential to carrying out its obligations with contractors and subcontractors would be reduced; that its operations "will be hampered and its functions irreparably damaged by the reduction of its working capital"; and that it will be forced either to continue supplying customers directed to withhold payment, impairing its assets and the interests of stockholders or, in the alternative, to refuse making such shipments with the asserted consequence of being unable to continue in business, "inasmuch as a substantial portion of its market for its products presently is prime contractors with the United States and subcontractors thereof."

[43] Appellant also alleges that it "could not recover interest for the use of its money" in a suit against the United States in the Court of Claims, which on other counts it asserts is both unavailable and inadequate. There is no allegation, however, concerning interest as not being recoverable in suits against its customers. And, as we have pointed out above, the statutory indemnity provided for such contractors is in sufficiently broad terms to cover interest as well as any other liability incurred by them through authorized withholding, a guaranty which certainly would not preclude recovery of interest by the suit against the contractors if terminated on the merits in appellant's favor.

tion of a court of equity, particularly in order to avoid or anticipate the congressionally authorized proceeding.

Nor, in the facts of this case, is the showing made concerning multiplicity of suits sufficient for that purpose. Appellant's case as made in this feature is that it would be forced to sue some sixteen "or more" customers, in various and scattered jurisdictions, with consequent expense of litigation and "resultant ill-feeling and irreparable injury" to good will and appellant's business. On the other hand stands the affidavit of appellee Hirsch that direction for withholding and payment into the Treasury will not be needed or given in more than two or three instances, and in case any balance should remain it will be collected through suit instituted by the Government.

Whether the District Court accepted one version of the facts or the other, it found there was no sufficient basis in the claim of multiplicity to sustain equity's assumption of jurisdiction. We would not be disposed to override that judgment of the trial court, turning as much as it may upon questions of fact.[4]

Moreover, it is not apparent, at any rate from the allegations, why it would be necessary for appellant to sue all of the sixteen customers or indeed perhaps more than one of them in order to secure a determination of its constitutional rights or preserve its rights. A single test suit would serve the former purpose fully, and there are no allegations of fact sufficient to show that appellant's

[4] It is perhaps of some significance in this respect that the complaint contains allegations, though not made in this connection, relating to both the fiscal years 1942 and 1943 to the effect that over 80 per cent of the dollar value of appellant's total shipments were made to three private concerns, Fairchild Engine and Airplane Corporation, General Motors Corporation, Woodward Governor Company, and the United States Navy. Concerning the shipments to the Navy, see note 8.

rights of recourse against others probably would be lost by awaiting the outcome of such a suit, either legally through the operation of statutes of limitations or practically, as we have said, through any probable incidence of insolvency.

In the absence of either kind of showing, the injury appellant seeks to avoid by the argument of multiplicity actually comes down, as we have said, to deprivation of the use of the amount withheld for the period required for completion of the Tax Court proceedings or a test suit against a customer. Whether or not there will be any injury in this limited respect depends of course, first, on the outcome of the Tax Court proceedings, particularly in relation to the matters of coverage; second, on whether, upon the assumption that those proceedings sustain the Government's claim as to all or part of the $270,000, the amount thus found due is finally held, in authorized litigation, to be due and owing to the appellant or to the Government. And; as we have also said, if that result should favor the appellant, the Government's obligation to indemnify the contractor would be, in effect, indirectly available to appellant to indemnify it for any loss of the use of the moneys withheld.[45]

Whatever might be true in other circumstances, this showing as to the necessity for suing many customers is hardly sufficient to justify the substitution of equity's extraordinary relief for what in all the conditions of this case appears to be a full, adequate and completely available remedy at law. *Coffman* v. *Breeze Corporations, supra; Macauley* v. *Waterman S. S. Corp., supra.*

Indeed the argument of multiplicity, with others, was expressly advanced and rejected in the *Waterman* case, as ground for not applying the *Myers* rule and for sustaining declaratory and equitable intervention to circumvent it.

[45] See note 43 *supra.*

After noting the company's claim, with others, that "it would be subjected to a multiplicity of suits in order to recover the money due on the contracts," we there said: "Even if one or all of these things might possibly occur in the future, that possibility does not affect the application of the rule requiring exhaustion of administrative remedies. The District Court had no power to determine in this proceeding and at this time issues that might arise because of these future contingencies." 327 U. S. at 545.

This case is perhaps even stronger than the *Waterman* case for application of the *Myers* rule. For here the appellant is a subcontractor retaining what the contractor complainant did not have in the *Waterman* case, namely, a completely adequate remedy at law against its customers, buttressed by the Government's guaranty of indemnity to the contractor for all liability incurred by him on account of withholding funds allegedly due the appellant.

In view of that fact the further one that constitutional issues are included among those tendered in this case but were not presented in the *Waterman* case, becomes wholly immaterial. To countenance short-circuiting of the Tax Court proceedings here would be, under all the circumstances but more especially in view of Congress' policy and command with respect to those proceedings, a long overreaching of equity's strong arm.

The judgment is

Affirmed.

MR. JUSTICE JACKSON concurs in the result.

MR. JUSTICE DOUGLAS dissents.